SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1973

No. 73-1845

PAUL BROWN and UNITED STATES TELEPHONE COMPANY,

Petitioners-Appellants,

against

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE COLLATERAL PROCEEDING OF A WRIT OF ERROR CORAM NOBIS ON THE CRIMINAL CONVICTION

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964-8866

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of Facts	3
Preliminary Statement	3
Reasons for Granting the Writ	11
Arguments on Question 1	11
Conclusion	35
Appendix A:	
Judgment (Memorandum Decision of Judge Pierce)	A1
Order of United States Court of Appeals for the Second Circuit	A4
Appendix B:	
Statutes Involved	B1
Appendix C:	
Indictment	C1
Government's Exhibit 40	C7
Government's Exhibit 41	C8
Government's Exhibit 43	C9
Government's Exhibit 45	C10

PAGE

Cases Cited

Abbate v. United States, 359 U. S. 197, 79 S. Ct. 666 ..... 27, 35

Ashe v. Swenson, 397 U. S. 442, 90 S. Ct. 1189 ....17, 19, 26, 27, 29

Blockburger v. United States, 284 U. S. 299 20

Cardarella v. United States, 375 F. 2d 222 (8th Cir. 1967) 21, 24

Gavieres v. United States, 220 U. S. 338 20

Gebardi v. United States, 287 U. S. 112 ..... 18, 19

Green v. United States, 355 U. S. 184, 78 S. Ct. 221 (1957) 26, 28

Harris v. Washington, 92 S. Ct. 183 17

Johl v. United States, 370 F. 2d 174 (9th Cir. 1966) 21

Mancuso v. United States, 464 F. 2d 1273 (10th Cir. 1972) 31

Nielson, In re, 131 U. S. 176, 9 S. Ct. 672 18

Nolan v. United States, 423 F. 2d 1031 (10th Cir. 1970) 21

Nye v. Nissen, 336 U. S. 613 19

Ottomano v. United States, 468 F. 2d 269 28

PAGE

Pereira v. United States, 374 U. S. 1 20

Pinkerton v. United States, 328 U. S. 640 ....11, 16, 17, 19

Sealfon v. United States, 332 U. S. 575, 68 S. Ct. 237 (1948) 29, 34, 35

United States v. Addington, 471 F. 2d 560 (10th Cir. 1973) 28, 32, 33

United States v. Buonomo, 441 F. 2d 922 (7th Cir. 1971) 21

United States v. Bryan, 483 F. 2d 88 (3rd Cir. 1973) 32

United States v. Cioffi, 487 F. 2d 492 (2nd Cir. 1973) 33

United States v. Fassoulis, 445 F. 2d 13 (2nd Cir. 1971) 18, 30

United States v. Gallishaw, 428 F. 2d 760 (2nd Cir. 1970) 32

United States v. Katz, 271 U. S. 613 18

United States v. Kramer, 289 F. 2d 909 (2nd Cir. 1961) 20, 30, 33, 34

United States v. Sall, 116 F. 2d 745 (3rd Circuit) .. 19

United States v. Tierney, 424 F. 2d 643 (1972) 28

Wingate v. Wainright, 464 F. 2d 209 (5th Cir. 1972) 30

Wood v. Ross, 434 F. 2d 297 (4th Cir. 1970) 20

Yawn v. United States, 244 F. 2d 235 (5th Cir. 1957) 30

Statutes Cited

PAGE

Constitution of the United States:

Fifth Amendment 2, B1

18 U. S. C. 371 ..... 2, B1

18 U. S. C. 542 ..... 2, 16, 17, B2

18 U. S. C. 545 ..... 2, B3

18 U. S. C. 2 ..... 2, 16, 17, B4

28 U. S. C. 2101(c) 2, B5

28 U. S. C. 1254(1) 2, B5

28 U. S. C. 1651(a) 2, B5

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Petitioners-Appellants Paul Brown and United States Telephone Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the denial by United States District Court Judge Lawrence W. Pierce of a petition for Writ of Error Coram Nobis to vacate the judgment of conviction under 18 U. S. C. 542 and to dismiss the indictment.

Opinions Below

The opinion of District Court Judge Lawrence W. Pierce appears at Appendix A, *infra,* p. A1. There was no formal opinion by the Court of Appeals for the Second Circuit, Appendix A, *infra,* p. A4.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, affirming the denial of the Writ of Error Coram Nobis of both petitioners-appellants, was entered on March 19, 1974. This petition for certiorari was filed less than ninety days from the date aforesaid. 28 U. S. C. 2101(c). The jurisdiction of this writ is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the Government's case at the second trial against the petitioners-appellants, the alleged aiders and abettors of the substantive crimes, required the Government to prove the very agreement relied on to establish a conspiracy which was necessarily adjudicated in the first trial to be nonexistent, so that not only did the doctrine of collateral estoppel preclude the Government from reintroducing that agreement into evidence, but moreover, since the evidence required to support a conviction on one indictment was sufficient to warrant a conviction upon the other, the doctrine of double jeopardy precluded the Government from a second prosecution.

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment to the Constitution of the United States, 18 U. S. C. 371, 18 U. S. C. 542, 18 U. S. C. 545, 18 U. S. C. 2, 28 U. S. C. 2101(c), 28 U. S. C. 1254(1) and 28 U. S. C. 1651(a).

Statement of Facts

Preliminary Statement

Under Indictment 71 Cr. 235 filed on March 2, 1971, in seventy-three counts, Petitioners-Appellants were charged with one count of conspiracy to "violate Sec. 371 and to commit offenses in violation of Sec. 542, 545 and 2 of Title 18 of the United States Code"; thirty-six counts of entering goods by means of false statements in violation of 18 U. S. C. Sec. 542 and 2 and thirty-six counts of smuggling goods into the United States in violation of 18 U. S. C. 545 and 2.

The case was originally tried before the Honorable Sylvester J. Ryan and a jury on May 24, 1971, resulting in an acquittal on June 3, 1971, of the conspiracy count "to violate Sec. 371 and to commit offenses in violation of Sec. 542, 545 and 2 of Title 18 of the United States Code", and in a mistrial on June 3, 1971, on the remaining seventy-two counts due to the jury's failure to reach a verdict.

On June 29, 1971, at the beginning of the second trial, before the Honorable Lawrence W. Pierce, on the government's motion, the Court dismissed with prejudice the smuggling counts, Sec. 545 and 2 (Counts 38 through 73). On July 2, 1971, the jury found both defendants guilty on the false statements counts, Sec. 545 and 2 (Counts 2 through 37). Significantly, after the verdict of guilty and on July 29, 1971, the Petitioners-Appellants were served with a summons and complaint by the United States Government for a civil action to recover approximately six million dollars for fraud penalties.

On September 30, 1971, Judge Pierce fined the petitioner Paul Brown $1,000.00 on each of the third-six counts for a total fine of $36,000.00 and imposed consecutive two-day

prison sentences on each of the thirty-six counts, to be served on weekends. Judge Pierce then sentenced the petitioner United States Telephone Company to a fine of $100.00 on each count for a total fine of $3,600.00.

An appeal was timely filed and the Court of Appeals on March 6, 1972, affirmed the judgment of conviction. On March 22, 1972, the District Court reduced the fine of the petitioner Paul Brown to $350.00 per count and suspended his prison sentence, while maintaining the $100.00 of the petitioner United States Telephone Company for each count. On June 12, 1972, Petition for Writ of Certiorari, which was duly filed, was denied by the United States Supreme Court.

On January 5, 1973, the petitioner filed a Writ of Error Coram Nobis requesting that the judgment of conviction be vacated, the sentence be expunged and the indictment be dismissed due to a violation of the Fifth Amendment. On August 1, 1973, United States District Court Judge Lawrence W. Pierce, in the Southern District of New York, accepted jurisdiction of the Writ, but ordered a denial of said writ on the merits. On March 19, 1973, the Circuit Court of Appeals for the Second Circuit affirmed without opinion the lower court's decision.

The proof established during both trials was that Paul Brown, an importer, and United States Telephone Company, a corporation owned and operated by Brown, and which concededly was his alter ego, had on the thirty-six occasions specified in both indictments entered decorative telephones into the United States by submitting documents to customs, for purposes of entry, which were dissimilar to other documents pertaining to the same shipments submitted to a bank for purposes of letters of

credit and that all of these invoice documents were prepared by Greenhill-Kato & Co., Ltd., in Japan, which was named as a co-conspirator in the first trial.

Each one of the thirty-six exhibits pertaining to the importation of the merchandise, used in both trials, consisted of attachments A, B, C, D and E. These exhibits, as explained by Government witness Agent Horian in the first trial (Tr. 106-109) and Government witness Agent O'Brien in the second trial (Tr. 41-44), are broken down as follows: all A exhibits were summary sheets which reflected a compilation of all of the merchandise that was entered on a given occasion; all B exhibits were commercial invoices which indicated the name of the seller, the name of the buyers, the quantity purchased, the description of the merchandise, a unit value and a total value; all C exhibits were special customs invoices which indicated the same information as the commercial invoice but in addition had various printed questions to be answered by the shipper or the supplier; all D exhibits were higher commercial invoices relating to the same shipment but submitted to a bank for purpose of payment on a letter of credit; and all E exhibits were bank letters of credit draft-debits. The three documents, Exhibits A, B and C, submitted to customs and the two documents, Exhibits D and E, submitted to the bank on the thirty-six occasions listed in both indictments, were admitted into evidence and were identically the same.

The Government in both trials unequivocally established in its case in chief that Brown directed Greenhill-Kato & Co., Ltd., a Japanese company, mentioned as co-conspirator in the first trial, to prepare in Japan at least two sets of invoices for each and every shipment of telephones sold by Greenhill-Kato to U. S. Telephone Co. as the purchaser-importer. At both trials, the Government proved

that Greenhill-Kato, pursuant to an agreement with Brown and his corporation, would fill out and send both sets of invoices to Brown's corporation and upon entry of the telephones, Brown's corporation would submit the set of invoices reflecting a lower purchase price to customs and pay the seller for the merchandise by letters of credit based on the higher priced invoice submitted to a bank. Thus the proof established at both trials that for the very same shipment the commercial invoice presented to customs had a lesser purchase price per unit and consequently a correspondingly lesser total price for all of the phones than the commercial invoice presented to the bank for the execution of the letter of credit. It was also established in both trials that the special customs invoice, which had to be submitted to customs together with the commercial invoice, contained questions to be answered affirmatively or negatively, to wit, that there were no other invoices and that the invoice contained true and correct statements. Therefore, the fact that a dissimilar invoice was submitted by the defendants to a bank, apparently contradicted in itself the answers to the statements in the special customs invoice submitted to customs, namely, that there were no other invoices and that the customs invoice contained true and correct statements. It was established in both trials that Greenhill-Kato had itself answered the above statements in collaboration with Paul Brown.

In both trials, the Government established, in its case in chief, that Greenhill-Kato in Japan prepared the documents received in evidence as B, C and D exhibits, to wit, the commercial invoice, the special customs invoice and the higher commercial invoice; this was established as part of the Government's case in the first trial through a Mr. Goto, an employee of Greenhill-Kato (Tr. 30-34),

and through Agent O'Brien in the Government's case in the second trial (Tr. 45; 46; 58; 68; 126). In both trials, the Government established through Anthony Ferriola, an officer of the brokerage house W. J. Byrnes, that the summary sheets which were the A exhibits were made up in reliance on the accuracy of the B and C exhibits submitted to it by Brown's corporation, who had received them from Greenhill-Kato. Moreover, in both trials, Mr. Ferriola admitted on cross examination that at times customs changed its rulings on what is dutiable or not and that documents pertaining to letters of credit need not be submitted to customs. In both trials, in the first through the witness Dominick Policano, a bank official, and in the second trial by reading in Policano's testimony from the first trial, the Government established that Greenhill-Kato submitted the higher invoice for payment as evidenced by the E exhibits, which were bank letters of credit draft-debits.

In both trials, the Government witness Solomon Chamama, an employee of the U. S. Telephone Co., testified pertaining to those 36 importations that Brown had given him one set, containing a commercial invoice and special customs invoice to be sent to customs, and thereafter had given him a second set, containing a commercial invoice and special customs invoice covering the exact same shipment but setting forth a higher price to be entered on the corporate books as the purchase price. On cross examination, Chamama stated at both trials that these two different sets of documents served "two distinct and separate purposes". Chamama also testified in both trials that various sums of money paid by the letter of credit went to pay extraneous expenses such as factoring costs.

Agent Walsh testified in both the first and second trials in rebuttal, and his testimony related to his meeting

Brown on one occasion, Brown and his attorneys on another occasion and Brown's attorney on a third occasion, and of their failure to turn over documents he requested during the course of his investigation. Agent Walsh on cross examination in both trials admitted he was not infallible, that his interpretation of the tariff laws could be wrong and that therefore there is a U. S. Customs Court to reconcile these differences of opinion.

Agent O'Brien, who testified in both trials, in the first trial on rebuttal and in the second trial in the Government's case in chief, stated that Brown did not supply him with documents even after Brown had been called down to see him and after O'Brien subsequently telephoned him on several occasions. Agent O'Brien in both trials admitted that decorative telephones were a new item under the tariff regulations, that his interpretation of the tariff law could have been wrong, that the Customs Court decided these issues and that the Court also from time to time rules against the Bureau's interpretations.

In both trials, the Government established in its case in chief that actual value and not price is the basis for the assessment of duty. The defendant Paul Brown, being in total agreement with that testimony, testified in both trials that the invoice presented to customs represented the true value of the goods, while the invoice relating to the same shipment, which was presented to the bank for the letter of credit financing, included not only the purchase price but also sums not related to value and not dutiable, hence the difference in price. Thus, in both trials, in the first trial at Tr. 242-243 and in the second trial at Tr. 296, 312-313, defendant Paul Brown testified that the prices listed on the invoices submitted to customs were correct, that the higher price listed on the invoice to the bank

included expenses not dutiable, such as engineers, lawyers, accountants, designers, advertising costs, advance deposits for the factor, defective items purchased but never imported, defective tooling, dyeing and molding costs. The defendant testified in both trials that the documents submitted to customs had a separate and distinct purpose from those submitted to the bank and that there should be no equating of the two, since they had served different roles. In both trials he stated he had consulted three firms of attorneys who specialized in customs law: Barnes, Richardson and Colburn; Gladd and Tuttle; and Segal, Mandel and Davison. He stated that from 1965 up until the indictment, none of these firms, who were fully cognizant of his method of operation, ever informed him that what he was doing was in violation of customs rules or regulations. In both trials, he further testified that in an identical matter in California, the U. S. District Director of Customs there decided that this question be treated as a civil matter. In both trials he also testified that no agent at any time informed him of any possible criminal violations. On the contrary, in 1968, when Agent O'Brien finally advised the defendants to change their method of determining value based on the conclusions which the Bureau finally made, the defendants thereafter complied fully with that direction.

Moreover, the Government introduced into evidence in the first trial Exhibit 42 (Tr. 67) which became Exhibit 40 in the second trial (Tr. 467), being a letter sent by Paul Brown to Greenhill-Kato & Co., Ltd., in Japan, suggesting that since tool and die charges were not accepted by customs as a deduction any more, they increase the inspection fee 50¢ per telephone to equalize the situation (C7). The Government introduced into evidence in the first trial Exhibit 45 (Tr. 67), which became Exhibit 41 (Tr. 484)

in the second trial, a letter from Paul Brown to Greenhill-Kato acknowledging the problem they were having with customs (C8). The Government introduced Exhibit 52 (Tr. 78) in the first trial, which became Exhibit 43 (Tr. 525) in the second trial, which was a letter from Greenhill-Kato & Co., Ltd., to Brown advising him not to come to Japan because customs was making too many inquiries and matters would taper off later (C9). The Government introduced in evidence in the first trial Exhibit 47 (Tr. 67), which became Exhibit 45 (Tr. 578) in the second trial, which was a letter by Greenhill-Kato to a customer admitting the partnership between Greenhill and Brown (C10). These letters were used for purposes of cross examination and to establish intent to defraud on the part of Paul Brown, United States Telephone Co. and Greenhill-Kato.

The entire character and nature of the testimony of the witnesses at the second trial had been given at the first trial. There was, however, testimony at the first trial not repeated at the second, only because it was either cumulative or irrelevant. For in the first trial, Agent Donohue testified in rebuttal as to the physical arrest itself, which testimony was not used in the second trial, since the manner of the arrest was not made an issue. In the first trial, Agent Ripa testified as to the lack of cooperation by Brown in supplying information relative to their investigation, which testimony was not included in the second trial, but this lack of cooperation was attested to by Agents O'Brien and Walsh in both trials. Moreover, in the first trial, a schedule prepared by Government witness Agent Schwartz was admitted into evidence with reference to a summary of the 36 exhibits introduced at both trials, but this schedule was not offered in the second trial.

Reasons for Granting the Writ

Arguments on Question 1

In *Pinkerton* v. *United States*, 328 U. S. 640, 643, the Court stated that, "there are instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." As to the first element, to wit, "the agreement of two persons is necessary for the completion of the substantive crime", it was unequivocally established in both trials that the United States Telephone Company, for all intents and purposes, was the alter ego of Paul Brown, yet both Brown and the U. S. Telephone Co. were indicted as the aiders and abettors in the substantive counts of both trials. Moreover, in the first trial the court charged that for the commission of the conspiracy there had to be an arrangement between Brown, the United States Telephone Company and another, to wit, Greenhill-Kato in Japan through its general manager Frank Horiuchi and/or its president, Nobi Kato.

In this regard, I quote verbatim from Judge Sylvester Ryan's charge in the first trial, relative to the conspiracy count (Tr. 679-680):

> "Now, here I want to point out to you that the defendant Brown is an officer of the defendant corporation. He is really the managing agent, general man in charge, and here it appears that all the corporate affairs were conducted through him and by him.
>
> "Of course one cannot conspire with himself, and here for purposes of law, the corporation, which

> exists only in the contemplation of the law—it is a figment of the law, it is a juristic person, a person in the law, and yet you can't talk to a corporation except through its officers or its agents—and in order to predicate a charge of conspiracy here and to sustain a charge of conspiracy, the government must prove beyond a reasonable doubt that this conspiracy, if you find it did exist, existed between not only Brown and the corporation, which are one, but with others, and the indictment names as co-conspirators, although they are not named as defendants, Nobi Kato . . . Frank Horiuchi and Greenhill Kato & Company, Ltd.
>
> "They are co-conspirators named in the indictment as co-conspirators but not named as defendants. The government must prove beyond a reasonable doubt that one or more of them conspired with Brown to accomplish the unlawful purposes alleged in the indictment before you can hold or find that there was in fact a conspiracy."

The existence of this same combination was again necessary for the proof of the substantive counts in the second trial and this conclusion is even made manifest by the statement of facts in the government's answering brief (pages 2-3) to the Circuit Court of Appeals in the second trial, specifying what the government had proven in the second trial as to the substantive counts, to wit:

I. The Government's Direct Case

> . . . The essence of the scheme was that Brown directed Greenhill-Kato & Co., Ltd., a Japanese Company ("Greenhill-Kato") to prepare at least

two sets of invoices for each and every shipment of telephones purportedly sold by Greenhill-Kato to United States Telephone Co., as the purchaser-importer. Greenhill-Kato would send both sets of invoices to Brown and, upon entry of the telephones, Brown would submit the set of invoices reflecting a lower purchase price to Customs and pay the seller for the merchandise by letters of credit based on the second set of invoices reflecting a much higher purchase price. Since the higher priced invoices and letters of credit were never shown to Customs, duty was assessed based on the lower false purchase price. The proof established that the invoices presented to Customs falsely stated the amounts listed as the unit price and total price for the telephones, falsely stated that all charges were listed, and falsely stated that there were no other invoices and that the invoices contained true and correct information.

The invoices and other documents submitted to Customs upon entry of the telephones on the thirty-six occasions listed in the indictment were admitted in evidence. Also admitted for each of these shipments were debits on letters of credits and, for most of the shipments, the actual invoices which were sent to Brown by the seller which established that a higher price was actually paid for the telephones than was disclosed on the false invoice submitted to customs.

Still another portion of Judge Ryan's charge on conspiracy evidences the fact that United States Telephone and Brown are one and that another person is necessary for the conspiracy to exist (Tr. 682).

"A corporation, such as United States Telephone, is a person under the law and can, therefore, be a party to a conspiracy just like any natural person.

"The evidence shows and it is admitted that there was a close connection between these two defendants and that Brown controlled, managed and directed the affairs of the United States Telephone Company and therefore, in order to find that a conspiracy exists you must find that either or both defendants conspired and agreed with at least one of the named co-conspirators, Frank Horiuchi, Nobuyuki Kato or Greenhill Kato Incorporated to submit false and fraudulent invoices to the United States Customs Authority; agreement between Brown and United States Telephone alone, as I have told you, is not sufficient.

"The government must show beyond a reasonable doubt that at least one of the named co-conspirators must have agreed along with these other two defendants or one of them before you may find a conspiracy existed as charged."

Also at Tr. 685:

"The object or purpose of the conspiracy it is charged, I again tell you, was to defraud the United States by violating the law with respect to the collection of information used in the enforcement of the customs laws. To conspire to defraud the United States means not only to cheat the government out of money or property, but also to interfere, to obstruct one of its lawful governmental functions by craft, deceit or trickery. It is not necessary that the government shall actually suffer property or pecuniary loss by the fraud; but only that its

legitimate purpose to collect the necessary information shall be impeded or defeated by misrepresentation, by trickery, by concealment or by overreaching."

To illustrate again that this same combination of persons was necessary for the substantive crime, I once more quote verbatim pertinent parts of another section of the government's answering brief to the United States Court of Appeals, Second Circuit (pages 9-10), concerning what it established on cross-examination of the defendant in the second trial.

B. Cross-Examination of Brown

". . . Two letters written by Brown on September 21, 1963 and September 30, 1963 directly contradicted Brown's denial. In the first letter Brown directed Greenhill-Kato to deduct $.90 per telephone for a tool and die charge and $.10 per telephone for an inspection fee. Seven days later, Brown informed Greenhill-Kato that Customs would no longer accept 'tool and die' charges for deduction and he directed Greenhill-Kato to increase the inspection fee to $.50 per telephone and replace 'tool and die' charges with a royalty fee of $.50 per telephone thereby equalling the original $1.00 total deduction he was taking prior to Customs disallowance of tool and die charges."

". . . However, Brown writing to Greenhill-Kato on April 21, 1965 referred to 'the problem with L/Cs and Customs' (Tr. 485; GX 41; 60a)."

"... also by a letter from Greenhill-Kato to Brown dated December 1, 1967, in which the Japanese agent advised Brown that it would be better if Brown did not come to Japan just then but that he should

wait until later when Customs' questioning might taper off (GX 43, 63a)."

As to the second element stated in *Pinkerton*, to wit, that there was no ingredient in the conspiracy which was not present in the substantive crime, it is singularly important for the appellate court, as it was for the jury in both trials, to understand the unique significance of the commercial and special customs invoices (the B, C and D exhibits). Their meaningfulness was testified to in the government's case in both trials; by Agent Horian in the first (Tr. 112-113) and Agent O'Brien in the second (Tr. 412); to wit, that these invoices are the first awareness customs has as to the importation and are vital to customs, since they are the basic documents whereby value can be determined at the critical moment of entry for purposes of duty. Therefore it is these invoices that activate Sec. 542 U. S. C. A. in conjunction with Sec. 2 U. S. C. A., which is the substantive crime charged in the indictment of the second trial and specifically states "fraudulent or false invoice, declaration or statement". Likewise, it was these invoices that activated the conspiracy charge of the first trial. That is why it was unequivocally established in both trials, in the first by government witness Mr. Goto (Tr. 56 and Tr. 61, 62), and in the second by the government witness Agent O'Brien (Tr. 46) as well as on the direct (Tr. 323) and cross examination (Tr. 400, 421, 422 and 423) of Paul Brown that these documents were prepared by Greenhill-Kato in Japan pursuant to an understanding between Brown and Greenhill-Kato as to the manner in which it was to be done and that thereafter, Greenhill-Kato sent these documents to the corporation office so that they then could be submitted to customs (Tr. 324). It was not only established that these "false" statements and documents are indeed filled out by Greenhill-Kato and sent

to Brown's corporation pursuant to their agreement, but also the very letters introduced into evidence by the government in both trials show that there was in fact this agreement to defraud the United States by these two parties, since one letter indicates that Greenhill-Kato and Brown were partners, another that Greenhill-Kato realized that both it and Brown's corporation had a customs problem and a third that they made arrangements to circumvent these problems. The letters demonstrate a meeting of the minds, an agreement, not just a physical participation as such, irrespective of Section 2 of U. S. C. A. They evidence then the agreement that was necessary prior to the commission of the substantive crime, but which very agreement the defendants had already been acquitted of. The government, through the device of the aiding and abetting statute, was permitted to establish in the second trial, since it had to, due to the very nature of the crime charged, the identical conspiracy which had already been adjudicated as non-existent in the first trial. Thus, it is understandable that collateral estoppel, which will be discussed later on, is part of double jeopardy, for the "ultimate issue . . . was decided by the jury in the first court trial in which petitioner was acquitted." *Harris* v. *Washington*, 92 S. Ct. 183. Collateral estoppel has been succinctly defined by the Supreme Court in *Ashe* v. *Swenson*, 397 U. S. 442, 443, "Where an issue of ultimate fact has once been determined by a valid and final judgment that issue cannot again be litigated between the same parties in any future lawsuit."

In the instant case, unlike *Pinkerton*, the defendants were acquitted of the conspiracy to commit the substantive offense (to wit, conspiracy to violate 542 and 2) and then convicted of the substantive offense (Sec. 542 and 2), which could not have been committed without there having been the initial conspiracy. In other words, the substan-

tive offense was but another attempt to prove the conspiracy charge, for which the petitioners were acquitted, since the agreement of at least two actual persons was necessary for the completion of the substantive crime, to wit, Greenhill-Kato through one of its officers mentioned in the conspiracy count, coupled with the United States Telephone Co. through Paul Brown.

Moreover, in regard to the second element, "there is no ingredient in the conspiracy which is not present in the substantive crime", or to state it in the terms of *United States* v. *Fassoulis,* 445 F. 2d 13, 18 (2nd Cir. 1971), "the necessary proof on the substantive charge is identical with that required to convict on the conspiracy charge". A reading of the very elements of proof necessary for the substantive crime herein charged clearly evidences the second element. *United States* v. *Katz,* 271 U. S. 613; *Gebardi* v. *United States,* 287 U. S. 112. The reading of the allegations in each clause of the conspiracy count, which were proved in the first trial, was merely a recital of what was offered in evidence at the second trial on the substantive counts.

The Supreme Court in *In re Nielson,* 131 U. S. 176, 9 S. Ct. 672, stated: "Where as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense". Analagously speaking, "proof of" the conspiratorial agreement (in the *Nielson* case the possession of distilling apparatus), "would necessarily have to be included in order to prove" the entering of goods by means of false statements (in the *Nielson* case the manufacture of liquor), "because such" entering of goods by false statements (in the *Nielson* case the manufacture of liquor) "would otherwise be impossible".

In *Nye* v. *Nissen*, 336 U. S. 613, as in *Pinkerton*, there again was a conviction on a conspiracy count, not an acquittal as in the instant case. In *Nissen*, the conspiracy charge was not inextricably interwoven with the substantive count as in the instant case, for in *Nissen*, the crime of conspiracy per se did not also charge a conspiracy to commit the very crime charged in the substantive counts. In the instant case, the substantive offense involves the same combination or community of purpose of two or more persons which was prosecuted in the conspiracy, to wit, United States Telephone Co. through Brown and Greenhill-Kato through its officers. It is impossible under any circumstances to commit the substantive offense without the cooperative action of those in the conspiracy count and yet the preliminary agreement between those same parties to commit that offense, which was to violate the substantive crime, had already resulted in an acquittal. *Gebardi* v. *United States, supra*, at p. 37. For as the court stated in *Ashe* v. *Swenson*, 90 S. Ct. 1189, relative to the collateral estoppel rule, which will be detailed later on, "the single rationally conceivable issue in dispute", in this case the agreement to enter goods by means of false documents, already had resulted in an acquittal and therefore "precluded subsequent prosecution . . .".

If, then, the second trial does not obviously "violate the letter of constitutional right it fractures the spirit", *United States* v. *Sall*, 116 F. 2d 745 (3rd Circuit). In short, then, Brown and United States Telephone Co. were acquitted of a conspiracy to commit those very overt acts enumerated in the conspiracy count and those very illegal ends specified in clause 7 of the conspiracy count, which very acts and illegal ends they later were convicted of on the substantive counts, on the same evidence for which they had already been acquitted. Thus, indeed, in the

second trial the defendants were "tried for an offense consisting of an essential element of the greater offense". *Wood* v. *Ross*, 434 F. 2d 297, 299 (4th Cir. 1970).

Granted that the rule is that offenses arising out of the same general course of conduct do not become the same for purposes of double jeopardy unless the evidence required to support a conviction on one indictment "would have been sufficient to warrant a conviction upon the other", *United States* v. *Kramer*, 289 F. 2d 909, 913 (2nd Cir. 1961), here the evidence which was required and presented for the subsequent conviction on the substantive counts was required and presented during the trial which resulted in an acquittal on the conspiracy count to commit the substantive crimes. Considering what was established in evidence by the prosecution in the second trial on the substantive counts, one can readily conclude when reading the conspiracy charge contained in the indictment that the evidence established in the second trial would have been sufficient for a conviction on the conspiracy count. Thus, as the evidence in both trials clearly demonstrates, the substantive offense and the conspiracy offense did not require proof of a fact not essential to the other, *Gavieres* v. *United States*, 220 U. S. 338, so that the "acquittal" on one does indeed "exempt the defendant from prosecution" on the other, *Blockburger* v. *United States*, 284 U. S. 299, 303. The substantive offense requires more than one person for its consummation and could not be accomplished by a single individual. The substantive counts of the second trial depend upon agreement and turn on the agreement mentioned in the conspiracy count of the first trial. *Pereira* v. *United States*, 347 U. S. 1, 14-16. In short, the substantive charge here contemplates the act of more than one person to perform the crime. But Paul Brown and the corporation were admittedly for all intents

and purposes one person; therefore, the substantive crime necessarily contemplates the cooperation or agreement of someone other than Paul Brown and the United States Telephone Co., to wit, Greenhill-Kato through its officers. See *Johl* v. *United States*, 370 F. 2d 174 (9th Cir. 1966). Thus, this case is the exception to the general rule that conspiracy is a different offense from the substantive crime. For it involves a crime that cannot be committed except by the concerted action of at least two persons, and is of such a nature that the immediate effect of its consummation reaches only the participants therein, so that the conspiracy to commit the crime is in such close connection with the objective offense as to be inseparable from it. *Nolan* v. *United States*, 423 F. 2d 1031 (10th Cir. 1970).

The defendants do not rely solely on the indictment to prove the identity of the earlier charge and the later substantive charge. *United States* v. *Buonomo*, 441 F. 2d 922 (7th Cir. 1971). For even assuming that the test is whether proof of any additional fact, not constituting an essential element of one of the offenses, is required to sustain a conviction of the other, *Cardarella* v. *United States*, 375 F. 2d 222 (8th Cir. 1967); here the conspiracy to commit the substantive crimes alleged in the conspiracy count, for which there was an acquittal, completely embraced the activitives described in the substantive counts.

Judge Pierce's charge as to the necessary elements of proof for substantive counts in the second trial clearly evidences that these elements of proof did not in fact involve essential elements excluded in the conspiracy charge by Judge Ryan at the first trial. In the second trial, the court initially charged as to the substantive counts (Tr. 764), "Essentially the indictment charges that on or about certain specified dates the defendants unlawfully, wilfully and knowingly entered and introduced into

the commerce of the United States merchandise by means of fraudulent and false invoices." It was unequivocally established that Greenhill-Kato of Japan had prepared the two sets of invoices and sent them to Brown's corporation, and logic dictates that the receipt of these invoices was a condition precedent to their being filed with customs for purposes of the substantive violations. Therefore, the jury of the second trial initially had to postulate the existence of an agreement to prepare the document, which the jury of the first trial had adjudicated as non-existent, for without the conspiratorial agreement by Greenhill-Kato to complete its role on the other side of the Pacific, there would have been no documents for which there could have been a substantive crime; that is to say, unless Greenhill-Kato lived up to its agreement as to the filling out of the documents, there would have been no documents and consequently there would have been no substantive violation.

In the first trial, the trial court charged (Tr. 685), "The object or purpose of this conspiracy it is charged, I again tell you, was to defraud the U. S. by violating the law with respect to the collection of information used in the enforcement of the customs laws." But the only way this could have been and was established was by the two sets of documents mentioned above. Specifically, Judge Ryan's charge in the first trial as to the three essential elements of proof for conspiracy recited (Tr. 680) (1) ". . . that an agreement existed and was made to defraud the United States in the collection of the information used in the enforcement of its customs laws." This very fact had to again be established in the second trial and was so established. That is why the government again introduced into evidence in the second trial the same letters introduced in the first trial, one evidencing a partnership between Brown and Greenhill-Kato (C10), a second evidencing their

mutual acknowledgment that a customs problem exists (C8), a third evidencing that Brown should not come to Japan because of the investigation (C9), and a fourth evidencing Greenhill and Brown's agreement to circumvent customs duties by substituting an inspection fee for a royalty fee (C7). Moreover, it was again established by the testimony in the second trial that Greenhill-Kato made out the documents just as this had been established in the first trial. (2) ". . . the particular defendant knowingly and wilfully joined in this corrupt agreement . . ." This had to again be established in the second trial and the government did so by use of the letters and by the testimony of Agents O'Brien, Walsh and Chamama. (3) "That at least one of the conspirators named in the indictment committed at least one of the overt acts as charged in the indictment." However, every overt act charged in the indictment as to conspiracy was again proved in the second trial, especially since each overt act in the conspiracy count related to the very period within the substantive counts of the second trial.

By way of comparison, Judge Pierce's charge in the second trial, as to the essential elements of proof of the substantive counts (Tr. 765), recited: (1) "That on or about the dates alleged in the indictment, the defendants entered or introduced or caused to be entered or introduced into the commerce of the U. S. the imported merchandise." The dates alleged in the indictment were those very same dates alleged within the clauses of the conspiracy count of the first trial and were the dates precisely within all the overt acts of the conspiracy charge itself. But this entry of merchandise could not have been done without the knowledge, consent and agreement of Greenhill-Kato in Japan, who had forwarded the documents on to the defendants. So that this in fact had to have been

proven twice by the government and determined twice by a jury. (2) "That it was done unlawfully, also wilfully and knowingly." This was obviously essential to the conspiracy *per se*, for without the agreement it could not have been done.

Therefore, the fact that these goods themselves physically came to the defendants from Greenhill-Kato in Japan; the fact that in order for their entry into this country, Greenhill-Kato knowingly prepared two sets of invoices pursuant to an agreement with the defendants; the fact that Greenhill-Kato consented to using the higher invoice to collect on the letters of credit pursuant to the scheme with the defendants; the fact that Greenhill, through correspondence introduced into evidence by the government, acknowledged to the defendants the understanding of the scheme and the desire to cover up; all of these facts being clearly established in both trials obviously indicates the indispensability of Greenhill-Kato's conspiratorial behavior with the defendants as a *sine qua non* for the commission of the substantive crimes. As the court in *Cardarella* stated, 375 F. 2d at 225, "the agreement to do the unlawful acts can be an offense separate and distinct from the doing of those acts themselves, even though this doing of the acts is the overt acts charged in the conspiracy count, except when such agreement is a necessary part of the substantive crimes. The question is dependent upon the nature of the ultimate facts which must be proved in each instance, not the specific evidence rendered to prove these facts."

Once again, I quote from a different section of Judge Ryan's charge on the conspiracy, in order to demonstrate that in all realism, according to the *Cardarella* court, "such an agreement is a necessary part of the substantive crime".

> "I remind you that the conspiracy charged is that Brown and United States Telephone Company on the one hand, and Greenhill Kato and two of its officers on the other, conspired to agree to submit false and fraudulent invoices to the United States Bureau of Customs upon entering merchandise exported from Japan by Greenhill Kato and imported into the United States by Brown and United States Telephone."

Obviously, to deny the existence of this agreement, which was necessary for the conspiracy charge, is to deny the existence of the substantive crimes, for without the agreement there could not have been substantive crimes.

The Court, in denying the writ of error *coram nobis,* stated, "in order to ascertain whether or not there was an independent basis from the evidence presented to the jury in the second trial from which a reasonable man could consider the guilt of the defendants in light of the acquittal in the conspiracy count before Judge Ryan, the jury could reasonably conclude that Paul Brown, as vice-president of U. S. Telephone, gave to Mr. Chamama, his bookkeeper, two sets of invoices for the same shipment, the lower priced one to be sent to customs and the higher priced one to be entered in accounts payable." However, this was the identical proof of the scheme of the conspiracy, which had already been established in the first trial. Moreover, most significantly, Brown could not have given these documents to Chamama unless Brown had received them from Greenhill-Kato and Greenhill-Kato could not have sent these two sets of documents to Brown, demonstrating, as Judge Pierce's opinion states, "that there were separate invoices for each shipment requesting that the lower priced one was always sent to customs for duty purposes and that the higher priced one was not sent to customs", unless there

had been a mutual agreement by Greenhill-Kato and Paul Brown to this effect, so that again there would not have been a substantive crime without the conspiracy itself. This was the *modus operandi,* it was the *sine qua non,* not only for the conspiracy charge but also for the substantive charge, and this was the government's case in both trials. Thus, the significance of what was stated in *Green* v. *United States,* 355 U. S. 184, 187, 78 S. Ct. 221, 223 (1957), "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the government with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

Now, since it has been unequivocally stated that collateral estoppel is "embodied in the Fifth Amendment guarantees against double jeopardy", *Ashe* v. *Swenson,* 90 S. Ct. 1189, 1195, the question involved is "where a previous judgment of acquittal is based upon a general verdict" the court is required "to examine the record of a prior proceeding taking into account the pleadings, evidence, charge and other relevant matters and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defndant seeks to foreclose from consideration", at 1194. The "issue" sought to be "foreclosed" is the agreement to make false documents. To follow the reasoning of the court at page 1195, "once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner" conspired to enter goods into the country by means of false documents, "the government could not present the

same evidence in a second prosecution", at 1196, for the entering of goods into the country by means of false documents. The "issue" that had to have been determined was that there was an agreement to make false documents, for without that agreement, the crime of entering goods by false statements could not have been committed. Even agreeing with the dissenting opinion of Justice Berger in *Ashe* v. *Swenson, supra,* that double jeopardy should apply unless "As to the victims the criminal conduct is readily divisible and intensely personal; each offense is an offense against a person"; here, the criminal conduct as to the conspiracy charge is inextricably interwoven with the substantive charge and the criminal conduct is far from being an offense against a person, so that double jeopardy does attach.

The same evidence test is not constitutionally required. *Abbate* v. *United States,* 359 U. S. 197, 198, 79 S. Ct. 666, 671-673. Moreover, although the terms used by Justices Brennan, Douglas and Marshall in their concurring opinion in *Ashe* v. *Swenson, supra,* to wit, "a single transaction", "one criminal episode", is not the majority opinion, nevertheless those terms uniquely express the factual situation here. For the charges in the first case were joined together, since they were of a similar character and were based on transactions connected together and did constitute part of a common scheme.

In *Ashe* v. *Swenson, supra,* 397 U. S. at 444, 90 S. Ct. at 1189, the Supreme Court gave effect to the operation of collateral estoppel with realism and rationalization as to the issues determined. In examining the record in this realistic way, since the issue as to the unlawful agreement, to wit, the conspiracy as to the transactions involved here, was actually determined in the prior prosecution, a collateral estoppel defense is available. For the second

prosecution is barred by a determination favorable to the defendants on the issue of conspiracy, i.e., the unlawful agreement in the earlier criminal prosecution and therefore the second prosecution required the defendant to "run the gauntlet", as said in *Green* v. *United States,* 355 U. S. 184, 190, 78 S. Ct. 221. Here the same witnesses and letters were offered and in effect the same evidence, since it was necessary to establish the conspiracy prior to establishing the substantive crime. Thus, the not guilty verdict as to a finding of conspiracy in the first trial concludes the issue in the second trial, especially considering the fact that the proof offered in the earlier case where the defendants were acquitted was re-introduced in the second case.

"Here the periods of time of the offenses alleged are" not "different" and do much more than merely "overlap". *United States* v. *Addington,* 471 F. 2d 560, 567 (10th Cir. 1973). Exactly the same persons are involved and the same time periods. The issue of ultimate fact of the conspiratorial agreement was already determined by the prior acquittal. Thus, it is clear that no "different times and transactions were involved" and therefore "a rational jury could" not "have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration and thus collateral estoppel would apply."

The First Circuit in *Ottomano* v. *United States,* 468 F. 2d 269, quoted from *United States* v. *Tierney,* 424 F. 2d 643, 645 (1972): "Conspiracy and aiding and abetting are separate offenses . . . an acquittal for conspiracy does not preclude conviction for aiding and abetting unless the acquittal results in a finding of fact in favor of the defendant which is essential to the substantive offense" (citations omitted). The acquittal of the defendants on the conspiracy charge constituted just such an essential deter-

mination in their favor; for the jury could have found them guilty on the substantive charge only by inferring an agreement between them and Greenhill-Kato; but the jury's verdict of not guilty on the conspiracy count was a determination that such an agreement did not exist; and thus the conviction on the substantive charge therefore violated the principles of collateral estoppel enunciated in *Ashe* v. *Swenson, supra.*

In *Sealfon* v. *United States,* 332 U. S. 575, 68 S. Ct. 237 (1948), which has exactly the same pattern as the instant case, a defendant was tried and acquitted of conspiring to defraud the United States by submitting false invoices to a government rationing board in connection with the sale of rationed commodities. Subsequently, Sealfon was tried and convicted of aiding and abetting the submission of these same false invoices. In both instances, the government case turned upon proof that a letter from Sealfon to a co-defendant had been written pursuant to an agreement to violate the law. On the basis of an examination of "the facts adduced at each trial and the instruction under which the jury arrived at its verdict", 332 U. S. at 579, 68 S. Ct. at 239, the Court concluded that the first jury's acquittal of the defendant on the conspiracy count could only have been based on a finding that the alleged illegal agreement did not exist. The Court thus determined that the Sealfon conviction on the substantive charge depended upon a fact necessarily adjudicated in his favor at the first trial and therefore reversed his conviction.

In the instant case, collateral estoppel is applicable, since a factual issue was necessarily determined in a previous litigation. The District Court decision denying the writ could only be based upon the conclusion that in the second trial there was no necessity to prove an agreement between Brown and U. S. Telephone Co. together

with Greenhill-Kato, Ltd., which of course is patently contrary to what the record establishes and to what was necessary for the government to establish in its case in chief in the second trial.

This case is not an example of where only one of the ten overt acts in the conspiracy is the basis of the substantive charge, *Yawn* v. *United States,* 244 F. 2d 235 (5th Cir. 1957), for here all the overt acts are the basis of the substantive charge, so that in this case the same ultimate fact, to wit, the agreement to make false statements, "cannot be twice litigated" after there has been a determination by a valid judgment (at page 237). Unlike *United States* v. *Fassoulis,* 445 F. 2d 13, 19 (2nd Cir. 1971), there was a second trial, so that it is indeed true that "collateral estoppel could not have arisen until after the verdict". As the court stated in *Wingate* v. *Wainright,* 464 F. 2d 209, 213 (5th Cir. 1972), "Certainly where an issue has been determined in a prior prosecution, the state is barred from bringing any subsequent prosecution in which a different determination of that issue is necessary to prove the offense charged." When the relitigated proof is offered to prove some element of the second offense, so that the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial, the words of Judge Friendly in *United States* v. *Kramer,* 289 F. 2d 909 (1961), to wit, that the Government "may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be", have unique significance. The prosecution simply may not in the course of any subsequent trial of the same parties relitigate an issue which was determined as an issue of ultimate fact in an earlier prosecution. Here indeed proof of all the essential elements of the offense

charged would necessarily require a relitigation of an ultimate fact previously determined.

"The essential inquiry, however, is whether the critical issues were within the power and authority conferred upon the first tribunal and whether the issues were actually adjudicated and clearly decided", *Mancuso* v. *United States,* 464 F. 2d 1273, 1275 (10th Cir. 1972). It is submitted that the critical issue, or the ultimate fact, or even the evidence relative to the conspiracy was adjudicated by acquittal and thus precludes the same critical issue, or the same ultimate fact, or even the same evidence being proven again for purposes of the substantive charge.

Virtually the same evidence offered by the government in the first trial was offered by the government at the second trial, to prove that Greenhill-Kato had provided Brown with the dual set of invoices with the intent of assisting Brown in defrauding the U. S. Customs laws. But it is not from this evidence alone, to wit, that Greenhill-Kato had drawn up and submitted the dual set of invoices pursuant to the corporation's agreement with Brown, that the petitioners seek to establish the necessity for the proof in the second trial of the conspiratorial agreement. For there was the introduction into evidence in the second trial of the letters which had also been placed into evidence in the first trial, and which letters demonstrated the conspiratorial agreement between Brown and Greenhill-Kato to defraud the Customs laws. In addition, there was the reading into evidence in the second trial of the testimony given by Policano in the first trial establishing that Greenhill-Kato had submitted the higher set of invoices for payment upon the letter of credit, pursuant to the conspiratorial agreement with Brown to defraud the Customs laws. Finally, the cross-examination of Brown pointedly elected this conspiratorial agreement in both

trials. All of this was an attempt to prove for the second time the *mens rea* of Greenhill-Kato necessary for the conspiratorial agreement, which clearly demonstrates that although the government was not legally required to prove the conspiratorial agreement as an element of the substantive crimes, nevertheless it found that as a matter of fact it had to do so. For the only way Greenhill-Kato could have aided and abetted the petitioners was in fulfillment of the conspiratorial agreement.

Moreover, as has also been demonstrated, "the jury was told in a singularly pointed way", *United States* v. *Gallishaw*, 428 F. 2d 760, 762-3 (2nd Cir. 1970), what was necessary to sustain a conviction for conspiracy in the first trial. "The point being that" Greenhill-Kato "had to know what kind of criminal conduct was in fact contemplated", *Gallishaw, supra,* at 763, note 1. Although no criminal intent to conspire was found in the first trial, there being an acquittal on the conspiracy count, nevertheless, substantially the same proof was presented in the second trial as to Greenhill-Kato in order to sustain a conviction on the substantive counts. At no time did the proof at either trial ever attempt to establish that Greenhill-Kato was an "innocent dupe". *United States* v. *Bryan*, 483 F. 2d 88, 93 (3rd Cir. 1973). On the contrary, the *mens rea,* the knowing willfulness of Greenhill-Kato to participate in a conspiracy, was clearly alleged by the government at both trials. Thus, unlike *United States* v. *Addington*, 471 F. 2d 560, 567 (10th Cir. 1973), it certainly can be stated that "the issue of guilty knowledge as to the transactions involved" in the second trial, "was actually before the prior jury for determination"; especially since "the periods of time of the offenses alleged" in the second trial were not "different" from those of the first and did more than "overlap". In short, the second

trial did not involve "different times and separate operations", but was "part of the same criminal episode or transaction" since "the substantive offenses and the conspiracy offense were of the same or similar character and based on transactions connected together and constituted part of a common scheme". *United States* v. *Addington, supra,* at 568. Indeed, "it is possible to determine with certainty what the jury in the earlier prosecution had decided", *United States* v. *Cioffi,* 487 F. 2d 492, 498 (2nd Cir. 1973). This is singularly true, since the issue of conspiracy at the first trial was "uncomplicated", *United States* v. *Kramer,* 288 F. 2d 909, 913 (2nd Cir. 1961). Therefore, as the court stated in *Kramer,* at 914, "there can hardly be mystery as to what was determined by the verdict of 'not guilty', general though it was. The jury was asked to determine a single question of the starkest simplicity . . .", so that "the government relitigated facts conclusively determined against it in the earlier trial."

The essentiality of the relitigation of the conspiratorial agreement is patent from the very fact that substantially the identical proof was offered at both trials. It is true that a "conspiracy per se" was not legally required to be proved at the second trial; however, "a defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue." *Kramer, supra,* at 915. "For to permit the government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the government from the extensive catalogue of crimes furnished it in the criminal code, would permit the very

abuses that led English judges to develop the rule against double jeopardy enshrined in the Fifth Amendment and still long before the proliferation of statutory offenses deprived it of so much of its effect". *Kramer, supra,* at 916.

Thus, the jury's verdict of not guilty on the conspiracy charge in the first trial "was a determination favorable to the petitioner of facts essential to the conviction of the substantive offense" in the second trial. *Sealfon* v. *United States,* 332 U. S. 575, 578, 68 S. Ct. 237, 239. This is made manifest from the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial. Petitioner Brown was in fact the only person on trial under the conspiracy charge; the corporation, United States Telephone Company, was his alter ego, so that only if an agreement with Greenhill-Kato was inferred by the jury could the petitioners have been convicted. Thus, the verdict was a determination that petitioners did not conspire with Greenhill-Kato to defraud the Customs laws.

Therefore, the basic facts of each trial were identical. Petitioners could be convicted of either offense only on proof of the unlawful agreement with Greenhill-Kato. The core of the prosecutor's case was in each trial the same: the dual set of invoices prepared by Greenhill-Kato under the directions of Paul Brown, the letters evidencing the conspiratorial agreement to defraud the U. S. Customs laws, the testimony of Policano demonstrating that Greenhill-Kato was paid from the letters of credit by presenting higher sets of invoices pursuant to the conspiratorial agreement, the cross-examination of Brown eliciting the *modus operandi* of this conspiratorial agreement and the circumstances surrounding these facts and to be inferred from them. In fact, "it was a second attempt to prove

the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent". *Sealfon* v. *United States*, 332 U. S. 575, 580, 68 S. Ct. 237, 240.

All in all, the logic of what Mr. Justice Brennan stated in *Abbate* v. *United States*, 359 U. S. 197, 199, 79 S. Ct. 663, 673, is obvious here: "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not have to be harassed by successive trials; that an accused shall not have to marshall the resources and energies necessary to his defense more than once for the same alleged criminal acts."

CONCLUSION

For all the reasons set forth above it is respectfully submitted that in the interests of justice and in light of the overriding issues which are presented here, this Petition for Writ of Certiorari should be granted, especially since the affirmance below is palpably erroneous and untenable, in that the writ of error coram nobis should have been granted and the judgment of conviction vacated, the sentence set aside and the indictment dismissed.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioners-Appellants.

APPENDIX A

Judgment (Memorandum Decision of Judge Pierce)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
71 Cr. 235
#39737

PAUL BROWN and UNITED STATES TELEPHONE CO.,
Petitioners,

– v –

UNITED STATES OF AMERICA,
Respondent.

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LAWRENCE W. PIERCE, D. J.

Judgment (Memorandum Decision of Judge Pierce)

Petitioners Paul Brown and the U. S. Telephone Company have moved for a writ of error coram nobis setting aside the judgment of conviction and the sentence, and dismissing the indictment against them. A review of the history of this case is helpful in considering the instant motion.

The original trial of this case before Judge Sylvester J. Ryan and a jury resulted in an acquittal on the conspiracy count and a deadlocked jury on 72 substantive counts. A retrial before this Court resulted in a conviction on the 36 substantive counts which were actually submitted to the jury, the government having moved before trial to dismiss 36 counts. The corporate defendant was sentenced to pay a fine of $100.00 on each of the 36 counts; the defendant Brown was initially sentenced to a $1,000.00 fine on each count, and 2 day prison sentences on each count to be served on weekends. Subsequently this latter sentence was reduced to $350.00 per count and a suspended prison sentence. The petitioners appealed and the conviction was affirmed; certiorari denied by the Supreme Court.

The basis of the instant motion is that the petitioners allege they were exposed to double jeopardy in the second trial in that substantive counts involved the same elements as the conspiracy charge on which they were acquitted. The Court does not agree.

In its consideration of petitioners' instant motion, the Court has fully reviewed the transcript of the proceedings before it from June 29, 1971 to July 2, 1971, in order to ascertain whether or not there was an independent basis from the evidence presented to the jury in the second trial from which a reasonable man could conclude the guilt of the defendants, in light of the acquittal on the conspiracy count before Judge Ryan.

Judgment (Memorandum Decision of Judge Pierce)

Petitioners allege that the substantive offenses charged in the second trial "obviously require more than one person for its completion and could not have been accomplished by a single individual". A reading of the statute under which defendants are charged 18 U. S. C. §542, reveals that it is a crime to enter or introduce or attempt to enter or introduce commerce into the United States by false statements or by false declarations, or to procure the making of any such false statement as to any material matter. From the testimony, the jury could reasonably conclude that Paul Brown, as vice-president of U. S. Telephone, gave to Mr. Chamama, his bookkeeper, two sets of invoices for the same shipment, the lower priced one to be sent to Customs, and the higher priced one to be entered in accounts payable. Further, the jury could reasonably conclude that there were separate invoices for each shipment in question, that the lower priced one was always sent to Customs for duty purposes, and that the higher priced one was not sent to Customs. Thus, the jury could find, and in fact did so find, that the alleged violation of 18 U. S. C. §542 could occur and did occur from the activities of the defendants.

In that the Court has found that indeed there was a basis for defendants' conviction on the substantive charges independent of the conspiracy allegation of which they were acquitted, it concludes there is no need to upset the conviction and attendant sentences, nor to dismiss the indictment. Defendants' application for a writ of error coram nobis is denied.

So Ordered.

Dated: New York, New York
August 1, 1973

LAWRENCE W. PIERCE
U. S. D. J.

Order of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of March one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LOMBARD
HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges.

73-2646

PAUL BROWN and UNITED STATES TELEPHONE COMPANY,
Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by: VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B

Statutes Involved

United States Constitution

Amendment V: Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code Annotated

Title 18

Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punish-

ment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

UNITED STATES CODE ANNOTATED

TITLE 18

Sec. 542. Entry of goods by means of false statements.

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. June 25, 1948, c. 645. 62 Stat. 715; June 30, 1955, c. 258, §2(c), 69 Stat. 242.

UNITED STATES CODE ANNOTATED

TITLE 18

Sec. 545. Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. June 25, 1948, c. 645, 62 Stat. 716; Aug. 24, 1954, c. 890, §1, 68 Stat. 782; Sept. 1, 1954, c. 1213, Title V, §507, 68 Stat. 1141; June 30, 1955, c. 258, §2(c), 69 Stat. 242.

UNITED STATES CODE ANNOTATED

TITLE 18

Sec. 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.

Statutes Involved

UNITED STATES CODE ANNOTATED

TITLE 28

Sec. 2101(c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

TITLE 28

Sec. 1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

TITLE 28

Sec. 1651(a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

1. From on or about the 23rd day of September 1963, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere Paul Brown and United States Telephone Company, named herein as defendants, and Nobi Kato, Frank Horiuchi and Greenhill Kato and Company, Ltd., (hereinafter Greenhill Kato), named herein as co-conspirators but not as defendants, and other persons unknown to the Grand Jury, unlawfully, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other to defraud the United States in its collection of information used in the enforcement of its customs laws and regulations thereunder, and to commit offenses against the United States, to wit, to violate Sections 542, 545 and 2 of Title 18, United States Code.

2. It was part of said conspiracy that the defendants Paul Brown and United States Telephone Company and the co-conspirators Nobi Kato, Frank Horiuchi and Greenhill Kato would and did enter and introduce and attempt to enter and introduce into the commerce of the United States imported merchandise, to wit, telephones manufactured in Japan, by means of false invoices, declarations, affidavits, papers and statements.

3. It was a further part of said conspiracy that the defendants Paul Brown and United States Telephone Company and the co-conspirators Nobi Kato, Frank Horiuchi and Greenhill Kato would and did fraudulently receive, conceal, buy, sell and facilitate the transportation, concealment and sale of the telephones referred to in paragraph 2 which had been imported into the United States contrary to law knowing the same to have been imported contrary to law.

4. It was further part of said conspiracy that Greenhill Kato in Japan would and did purchase the telephones referred to in paragraph 2 from Japanese manufacturers.

5. It was a further part of the said conspiracy that Greenhill Kato would and did export and cause to be exported from Japan to the United States the telephones referred to in paragraph 2.

6. It was a further part of said conspiracy that Greenhill Kato would and did prepare commercial invoices and Special Customs Invoices to be presented to United States Customs upon entry into the commerce of the United States of the Telephones referred to in paragraph 2.

7. It was a further part of said conspiracy that the co-conspirator Greenhill Kato would and did fraudulently and falsely state the amounts listed under "Invoice Unit Price or Value," "Invoice Totals" and "Amount," and would fraudulently and falsely state that the amount listed under "Invoice Unit Price or Value" is the purchase price for each item, that the amount listed under "Current Unit Price for Export to United States" is the price at which the goods are being sold or offered for sale for export to

the United States, that all charges are listed, and that "there is no other invoice(s)," and that all the information contained on the Special Customs Invoice is true and correct.

8. It was a further part of said conspiracy that the defendants Paul Brown and United States Telephone Company would and did submit and cause to be submitted to United States Customs upon entry of the telephones referred to in paragraph 2 into the commerce of the United States the commercial invoices and Special Customs invoices referred to in paragraph 6.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about March 14, 1966 the defendants Paul Brown and United States Telephone Company sent documents to W. J. Byrnes & Company of New York, Inc., 95 Broad Street, New York, New York.

2. On or about February 15, 1967 in Japan the co-conspirators Greenhill Kato exported telephones to the United States.

3. On or about March 13, 1967 the defendants Paul Brown and United States Telephone Company sent documents to W. J. Byrnes & Company of New York, Inc., 95 Broad Street, New York, New York.

4. On or about December 4, 1967 the co-conspirators Frank Horiuchi and Greenhill Kato sent a letter to the defendant Paul Brown.

5. On or about January 30, 1068 in Japan the co-conspirators Greenhill Kato exported telephones to the United States.

6. On or about February 24, 1968 the defendants Paul Brown and United States Telephone Company sent documents to W. J. Byrnes & Company of New York, Inc., 95 Broad Street, New York, New York.

7. On or about June 20, 1968 in Japan the co-conspirator Greenhill Kato exported telephones to the United States.

8. On or about July 25, 1968 in Japan the co-conspirator Greenhill Kato exported telephones to the United States.

9. On or about August 1, 1968 in Japan the co-conspirator Greenhill Kato exported telephones to the United States.

10. On or about August 22, 1968 the defendants Paul Brown and United States Telephone Company sent documents to W. J. Byrnes & Company of New York, Inc., 95 Broad Street, New York, New York.

11. On or about September 8, 1968 the defendants Paul Brown and United States Telephone Company sent documents to W. J. Byrnes & Company of New York, Inc., 95 Broad Street, New York, New York.

(Title 18, United States Code, Section 371).

Indictment

COUNTS TWO THROUGH THIRTY-SEVEN

The Grand Jury further charges:

On or about the dates set forth below in the Southern District of New York, Paul Brown and United States Telephone Company, defendants, unlawfully, wilfully and knowingly did enter and introduce and cause to be entered and introduced into the commerce of the United States imported merchandise, to wit, telephones manufactured in Japan, by means of fraudulent and false invoices, declarations, affidavits, papers and statements, to wit, fraudulent and false as to the amounts listed under "Invoice Unit Price or Value," "Invoice Totals," "Amount," and the statements that the amount listed under "Invoice Unit Price or Value" is the purchase price for each item, that the amount listed under "Current Unit Price for Export to United States" is the price at which the goods are being sold or offered for sale for export to the United States, that all charges are listed, that "there is no other invoice(s)," and that all the information contained in the Special Customs Invoice is true and correct:

• • •

(Title 18, United States Code, Sections 542 and 2).

COUNTS THIRTY-EIGHT THROUGH SEVENTY-THREE

The Grand Jury further charges:

On or about the dates set forth below in the Southern District of New York, Paul Brown and United States Telephone Company, defendants, unlawfully, wilfully, knowingly and fraudulently did receive, conceal, buy,

sell and facilitate the transportation, concealment and sale of merchandise imported and brought into the United States contrary to law, to wit, telephones manufactured in Japan, knowing the same to have been imported and brought into the United States contrary to law. Said telephones had been imported and brought into the United States contrary to Title 18, United States Code, Sections 542 and 2 in that said telephones had been introduced into the commerce of the United States by means of fraudulent and false invoices, declarations, affidavits, papers and statements:

• • •

(Title 18, United States Code, Sections 545 and 2).

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Foreman

Government's Exhibit 40

Greenhill-Kato & Co., Ltd.
10, 1-Chome, Kayabacho,
Nihonbashi, Chuo-ku,
Tokyo, Japan

Mr. Paul R. Brown
Crossbridge Towers
Fort Lee, New Jersey
U. S. A.

September 30, 1963

Attention: Mr. Frank Horiuchi

Dear Frank:

Can you please advise me, with respect to your progress concerning extension cords, and plugs and jacks, as per our letter of September 18th.

Invoice For Duty Purposes:

We advise, that the item—"Tool and Die Charge" is not acceptable to customs for exemption.

Please increase the "Inspection Fee" to 50¢ per phone, and replace "Tool and Die Charge" with "Royalty Fee—Payable Paul R. Brown For Design" .....50¢

We hope that this last item will be acceptable, and we hope that it will be better than "Tool and Die Charge", which is unacceptable.

Thank you for your kind attention to the above, and with kindest personal regards, I remain,

Most cordially,

Paul R. Brown
PRB:e

Government's Exhibit 41

April 21, 1965

Greenhill-Kato & Company
Greenhill Building
10, 1-chome, Kayabacho, Nibonbashi, Chuo-ku,
Tokyo, Japan

Attention: Mr. N. Kato

Dear Nobi:

I must replace 88 units of LANTIQUE to WSTC.

I have advised them that I will send them these 88 units from Japan free.

In order to accomplish this, knowing the problem with L/Cs and customs, I suggest you send them 12 units with each shipment of phones they receive, calling this "free goods for replacement and service".

Perhaps you can prevail upon one of the shipping companies to take 6 or 12 at a time via Captains Care for WSTC.

The numbers you must replace for him are the old model numbers LANTIQUE 1-3-7 and 11, and you can divide these up in accordance with your inventory on hand, of your LANTIQUE.

You can debit my account for same, and when debiting, please state: for claim settlement for WSTC, covering various matters.

Kindest personal regards,

PAUL R. BROWN

PRB:e

cc:WSTC

Government's Exhibit 43

(Letterhead of)

GREENHILL KATO & CO., LTD.
GREENHILL BUILDING
10, 1 Chome, Kayaba-Cho, Nihonbashi,
Chuo-ku, Tokyo,
Japan

Ref., #1161
Mr. Paul R. Brown
United States Telephone Co.
New York, N. Y.

Dear Paul:

This letter refers to yours dated Nov. 17 in which you informed that you will be in Japan next January.

We are inclined to think that your not coming here in November or December would result in your favor since the American Embassy's customs department is asking us from time to time if you arrived here.

Come January or February next year, their inquisitive questioning we think might taper off, however.

How are your family and Lynnada-san? I hope they are all in the best of health. My family members are doing well.

With my best personal regards to you all, I remain,

Yours very truly,

GREENHILL KATO & CO., LTD.
(Illegible)

SH/to

Government's Exhibit 45

GREENHILL KATO & CO., LTD.
TOKYO

#2950

Sept. 6, 1967

Greenhill & Ellis (Eastern) Ltd.
London, England

Dear Sirs:

Re: Telephone business

As a result of close consultation with our New York partner, Mr. Paul R. Brown of United States Telephone Co., we are pleased to advise that henceforth we shall be able to give your commissions for the captioned on the following basis.

Duchess	$.050	per unt
Seville	0.50	"
J84	0.50	"
Matoi	1.00	"
Majesty	1.00	"

In view of the foregoing please try your utmost to further develop this line and we are counting on your cooperation, we remain,

Yours very truly,

GREENHILL KATO & CO., LTD.
(Illegible)
P. P. Director

JN/to

cc: U. S. Telephone Co.—New York

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1845

PAUL BROWN AND UNITED STATES TELEPHONE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners[1] contend that their convictions for entering goods into commerce by means of false statements, in violation of 18 U.S.C. 542, placed them twice in jeopardy because they were acquitted at a prior trial on a conspiracy charge concerning the same transactions.

On March 2, 1971, an indictment was returned in the United States District Court for the Sourthern District of New York charging petitioners[2] with one count of

[1]Petitioner United States Telephone Company was owned and operated by petitioner Paul Brown.

[2]The indictment named Nobi Kato, Frank Horiuchi, and Greenhill Kato and Company, Ltd., as co-conspirators, but not as defendants (Pet. App. C1).

conspiracy to defraud the United States by smuggling goods into the country (18 U.S.C. 545) and introducing goods into commerce in the United States by false statements (18 U.S.C. 542), in violation of 18 U.S.C. 371, with 36 substantive counts of entering goods by means of false statements, in violation of 18 U.S.C. 542 and 2, and with 36 substantive counts of smuggling in violation of 18 U.S.C. 545 and 2 (Pet. 3; Pet. App. A2, B1-B4, C1-C6). Following a jury trial, petitioners were acquitted on the conspiracy charge and the jury failed to reach a verdict on the 72 substantive counts. Pursuant to the government's motion, the court dismissed the 36 counts of smuggling, and petitioners were re-tried and convicted on the 36 counts of entering goods by means of false statements, in violation of 18 U.S.C. 542 (Pet. App. A2-A3). Petitioner Paul Brown was sentenced to a fine of $350 on each count, and consecutive sentences of two days' imprisonment on each count to be served on weekends, which were suspended. Petitioner United States Telephone Company received a fine of $100 on each count (Pet. App. A2). The court of appeals affirmed (456 F. 2d 293), and a petition for a writ of certiorari was denied. 407 U.S. 910.

On January 5, 1973, petitioners moved for a writ of error *coram nobis* setting aside the judgment of conviction and the sentences, and dismissing the indictment against them. The application was denied (Pet. App. A1-A3), and the court of appeals summarily affirmed on March 19, 1974 (Pet. App. A4). The petition for a writ of certiorari was filed on June 8, 1974, and is substantially out of time under Rule 22(2) of the Rules of this Court.[3] In any event, there is no occasion to grant the writ.

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[3]Since this Court's decision in *United States* v. *Morgan*, 346 U.S. 502, 505, n. 4, it has been settled that a motion in the nature of a writ of error *coram nobis* "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and

1. The evidence adduced at the second trial established that on 36 occasions petitioners used two sets of invoices for shipments of telephones imported into the United States. One set of invoices (which was never shown to United States Customs officials) showed the actual purchase price paid to the seller, and the other set, bearing a lower purchase price, was presented to Customs for use in determining the duties to be paid (Pet. App. A3). See also *United States* v. *Brown*, *supra*, 456 F. 2d at 295.

Petitioners argue that their second trial and subsequent conviction violated the doctrine of collateral estoppel and subjected them to double jeopardy, contending that proof of an agreement between two or more persons was a necessary element of the substantive offense for which they were convicted (18 U.S.C. 542), and that the jury verdict in the first trial necessarily adjudicated the non-existence of such an agreement.

2. The extraordinary remedy of *coram nobis* is available "only under circumstances compelling such action to achieve justice" (*United States* v. *Morgan*, 346 U.S. 502, 511), and only where there are "sound reasons existing for failure to seek appropriate earlier relief * * * ." *Id.* at 512. Here, however, petitioners have shown no reasons for their failure to raise the belated double jeopardy and collateral estoppel claims at an earlier time. The issues

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record, the beginning of a separate civil proceeding." While the Court added in *Morgan* that a *coram nobis* motion "is of the same general character as one under 28 U.S.C. §2255" (*id.* at 506, n. 4), it has since said that "a motion under §2255, like a petition for a writ of habeas corpus * * * , is not a proceeding in the original criminal prosecution but an independent civil suit." *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7. Accordingly, the judgment of the court of appeals affirming the denial of the *coram nobis* motion was "the judgment of a court of appeals in a criminal case * * * ." Rule 22(2) of the Rules of this Court.

were not raised at all in the first trial, although petitioners' claim as to the identity of the conspiracy and substantive counts would seem to have been equally available then. Similarly, these issues were not raised at any time at the second trial, nor on appeal or in the petition for certiorari following affirmance of petitioners' conviction (in which proceedings petitioners were represented by their present counsel). Accordingly, the district court ought not to have entertained petitioners' motion for *coram nobis* relief.

3. Petitioners' double jeopardy and collateral estoppel arguments are, in any event, without merit. The statute that petitioners violated does not require an agreement between two or more parties for the commission of the offense (Pet. App. B2-B3), nor did the indictment allege such an agreement with respect to the counts under that statute (Pet. App. C5). Moreover, the actual submission of false invoices was not among the overt acts alleged in the conspiracy count (Pet. App. C3-C4). That the jury in the first trial may have found insufficient evidence of an agreement between petitioners and their alleged co-conspirators, and therefore returned a verdict of acquittal on the conspiracy charge, did not constitute a final adjudication as to petitioners that the underlying substantive offenses had not been committed. Cf. *United States* v. *Flowers*, 255 F. Supp. 485, 488-489 (E.D. N.C.).

At most, the acquittal established that petitioners and the Japanese suppliers named as co-conspirators did not agree to defraud the United States by entering imported merchandise by means of false invoices. That conclusion, however, is not inconsistent with the conclusion that petitioners actually submitted or caused to be submitted false invoices prepared by the suppliers. Proof that the suppliers had agreed to the submission of false invoices

in order to defraud the United States was an essential part of the conspiracy charge, but was not a necessary element of the substantive offenses, unlike the situation in *Sealfon* v. *United States*, 332 U.S. 575, on which petitioners rely.

Furthermore, where, as here, the commission of a substantive offense and a conspiracy to commit it are separable and distinct crimes, it is well settled that neither a conviction nor an acquittal on a conspiracy charge bars simultaneous or subsequent conviction on the substantive count, even as an aider and abetter. *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643-644.[4] The fact that some of the evidence to support the substantive convictions was also used in the earlier trial to support the conspiracy charge is immaterial. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *McGowan*, 423 F. 2d 413, 415-417 (C.A. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[4]Petitioners' situation is analytically no different than it would have been if the jury had convicted them on the substantive counts at the first trial while acquitting them on the conspiracy count. That a second trial occurred was not because they were charged anew following an acquittal, but simply because the jury at the first trial could not reach a verdict on the cuounts in question.

DOJ-1974-09